In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 100

PETER H. KLOPFER, *Petitioner*

vs.

STATE OF NORTH CAROLINA, *Respondent*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

BRIEF FOR THE PETITIONER

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CITATION TO OPINION

The opinion of the Supreme Court of North Carolina (R. 15-17.) is reported at 266 N. C. 349, 145 S. E. 2d 909 (1966).

JURISDICTION

The judgment of the Supreme Court of North Carolina was entered on January 14, 1966 (R. 17-18.). The petition for a writ of certiorari was filed on April 14, 1966, and was granted on May 31, 1966 (R. 19.). The jurisdiction of this Court is invoked under 28 U. S. Code, Section 1257 (3) since the issue raised is that of a denial by the State of a right conferred upon the petitioner by the Constitution of the United States.

QUESTION PRESENTED

In a State criminal prosecution, does the State deny to the accused the Constitutional right to a fair and speedy trial by procedurally suspending the prosecution indefinitely over the objection of the accused and without showing any justification for suspending the prosecution indefinitely?

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved are:

(1.) Sixth Amendment to the United States Constitution

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

(2.) Fourteenth Amendment to the United States Constitution

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or im-

munities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF CASE

On February 24, 1964, the Grand Jury for the County of Orange, State of North Carolina, returned a Bill of Indictment charging the petitioner, Peter H. Klopfer, with the criminal offense of trespass in violation of N. C. Gen. Stat. 14-134. (R. 2-3, 7-8.)

In March, 1964, Klopfer's case was brought to trial in the course of a three week Special Criminal Session of the Superior Court of Orange County. Klopfer entered a plea of "Not Guilty" to the offense charged. After due deliberation upon all the evidence, argument of counsel and the Court's charge, the jury was unable to agree upon a verdict. The Court thereupon withdrew a juror and entered an order of mistrial with Klopfer being directed to reappear in court for trial on the following Monday. However, Klopfer's case was not retried at that session of court. (R. 3-5, 8.)

Several weeks prior to the April 1965 Criminal Session of the Superior Court of Orange County, the Solicitor indicated to Klopfer's attorney his intention to have a *nolle prosequi* with leave entered in Klopfer's case. At the April 1965 Criminal Session of the Superior Court of Orange County, Klopfer, through his attorney in open court, opposed the entry of a *nolle prosequi* with leave. Klopfer's contention at that time was that the trespass charge was abated on the authority of *Hamm* v. *City of Rock Hill* 379 U. S. 306, 85 S. Ct. 384, 13 L. Ed. 2d 300 (1964). The Court indicated it approved the entry of a *nolle prosequi* with leave in Klopfer's case. The Solicitor then stated he did not desire now to take a *nolle prosequi* with leave in Klopfer's case and wanted to retain the case in its trial docket status. Klopfer's case was continued for the term at that time. (R. 5, 9.)

The trial calendar for the next criminal session of the Superior Court of Orange County in August, 1965, did not list Klopfer's case for trial. To ascertain the trial status of Klopfer's case, a motion was filed expressing Klopfer's desire to have the trespass charge pending against him permanently concluded as soon as reasonably possible in accordance with the applicable laws of the State of North Carolina and of the United States. Noting that some eighteen months had elapsed since Klopfer's being indicted, the motion requested the Court to inquire into the trial status of the charge pending against Klopfer and to ascertain when his case would be brought to trial. (R. 9-12.)

In his motion to secure a prompt trial, Klopfer, a professor of zoology at Duke University, alleged that the offense of trespass with which he was charged resulted from the attempt by him along with other persons to obtain service at a restaurant which was a "place of public accommodation" within the meaning of the Civil Rights Act of 1964. The motion cited *Hamm* v. *City of Rock Hill* 379 U. S. 306 (1964) for its holding that the Civil Rights Act of 1964 has retroactive effect so as to bar pending prosecutions of persons who, prior to passage of the Act, sought nondiscriminatory service at a "place of public accommodation". The motion contended the prosecution for trespass pending against Klopfer was barred and abated by *Hamm* v. *City of Rock Hill,* supra, with particular reference being made to the application of the *Hamm* ruling in the case of *Blow* v. *North Carolina* 379 U. S. 684, 85 S. Ct. 635 (1965). (R. 10-11.)

In response to the foregoing motion, the status of Klopfer's case was considered in open court on Monday, August 9, 1965, at the August 1965 Criminal Session of the Superior Court of Orange County. The Solicitor then moved the Court that the State be allowed to take a *nolle prosequi* with leave in Klopfer's case. The motion was allowed by the Court. The defendant objected and took exception to the entry of the *nolle prosequi* with leave. (R. 12.)

On appeal to the Supreme Court of North Carolina, the entry of *nolle prosequi* with leave in Klopfer's case was affirmed with the holding that indefinite suspension of the prosecution does not violate Klopfer's constitutional right to a speedy trial. (R. 15-17.)

SUMMARY OF ARGUMENT

a. Under North Carolina criminal procedure, an entry of *nolle prosequi* allows a case to be replaced on the trial docket by the Solicitor only with the consent of the court; but an entry of *nolle prosequi* with leave implies the consent of the court, and the Solicitor may have the case restored for trial at any time in his discretion without further order. In the *Klopfer* case, one trial was had on the criminal charge of trespass and the jury was unable to agree. Some sixteen months thereafter the Solicitor took a *nolle prosequi* with leave over Klopfer's objection. The North Carolina Supreme Court held that Klopfer has no grounds to complain that the *nolle prosequi* with leave deprives him of his constitutional right to a speedy trial, since an accused has no right to compel the State to give him his day in court if the State elects not to do so.

b. As a vital concern of society, the right to prompt administration of justice draws express endorsement in English legal history at least as far back as Magna Carta. The inclusion of the right to a speedy trial as the first procedural guarantee of the Sixth Amendment is persuasive evidence of the unanimity with which this right has historically been regarded as a fundamental standard of due process.

c. Previous decisions of this Court have defined the scope of the Due Process Clause of the Fourteenth Amendment to include most of the basic procedural safeguards of the Sixth Amendment. See especially *In Re Oliver*, 333 U. S. 257 (1948) (right to a public trial); *Gideon* v. *Wainwright*, 372 U. S. 335 (1963) (right to assistance of counsel); and *Pointer* v. *Texas*, 380 U. S. 400 (1965) (right to confrontation of witnesses). The vital interests of an accused safeguarded by the right to a speedy trial are identical

to some, and inextricably related to all the interests of an accused now protected by the Due Process Clause of the Fourteenth Amendment. Without question the Sixth Amendment right to a speedy trial is of such fundamental nature as to be an essential of due process and binding upon the States.

d. The effect of the holding in the *Klopfer* case is to deny to Klopfer forever his day in court. This ruling subjects Klopfer to the very evils against which the right to a speedy trial safeguards an accused. Unreasonable delay being a violation of the right to a speedy trial, it necessarily follows that absolute denial of trial to an accused, as with Klopfer, constitutes an emasculation of the right to a speedy trial.

ARGUMENT

North Carolina's nolle prosequi with leave procedure which permits the State, over the objection of the petitioner, to delay forever the petitioner's having his day in court denies the petitioner his right to a speedy trial in violation of the Sixth Amendment as made applicable to the States through the Fourteenth Amendment to the Constitution.

a. North Carolina's Nolle Prosequi with leave; the Solicitor's Prerogative and the Defendant's Predicament.

Full appreciation of the predicament confronting the petitioner, Klopfer, requires an understanding of the legal characteristics and effect of the *nolle prosequi* with leave entry in North Carolina criminal procedure.

Under North Carolina law, the procedural devices of *nolle prosequi* and *nolle prosequi* with leave[1] are closely related and a discussion of the one often necessitates reference to the other. *Wilkinson* v. *Wilkinson,* 159 N. C. 265, 74 S.E. 740 (1912); *State* v. *Klopfer,* 266 N. C. 349, 145 S.E. 2d 909 (1966).

1. In actual practice the terms, *"nolle prosequi"* and *"nolle prosequi* with leave", are respectively abbreviated to read *"nol. pros."* and *"nol. pros.* with leave".

The immediate legal effect of an entry of *nolle prosequi* or *nolle prosequi* with leave has been summarized by the North Carolina Supreme Court as follows:

> "A *nol. pros.* in criminal proceedings is nothing but a declaration on the part of the prosecuting officer that he will not at that time prosecute the suit further. Its effect is to put the defendant without day; that is, he is discharged and permitted to leave the court without entering into a recognizance to appear at any other time. . . ; but it does not operate as an acquittal, for he may afterwards be again indicted for the same offense, or fresh process may be issued against him upon the same indictment, and he may be tried upon it."
> *State* v. *Thornton* 35 N. C. 256, 257-258 (1852)
> Also see: *Wilkinson* v. *Wilkinson* 159 N. C. 265, 74 S.E. 740 (1912).

The sole distinction between *nolle prosequi* and *nolle prosequi* with leave relates to the procedure by which the State may resume prosecution of a defendant in whose case a *nolle prosequi* or *nolle prosequi* with leave has been previously entered. This distinction is succinctly stated in the *Klopfer* case as follows:

> "When a *nolle prosequi* is entered there can be no trial without a further move by the prosecution. The further move must have the sanction of the court. When a *nolle prosequi* is entered, the case may be restored to the trial docket when ordered by the judge upon the solicitor's application. When a *nolle prosequi with leave* is entered, the consent of the court is implied in the order and the solicitor (without further order) may have the case restored for trial."
> *State* v. *Klopfer* 266 N. C. 349, 350, 145 S.E. 2d 909, 910 (1966).

In the case of a prior entry of *nolle prosequi* with leave, the Solicitor may resume prosecution of the defendant simply by requesting the clerk to issue a *capias* for the defendant. *Wilkinson* v. *Wilkinson* 159 N. C. 265, 74 S.E. 740 (1912).

In general terms, the North Carolina Supreme Court has observed that the *nolle prosequi* procedure is part of the court process appropriately used to help "bring offenders to trial and justice". *State* v. *Smith* 129 N. C. 546, 548, 40 S.E. 1 (1901). The sole statutorily prescribed use of the *nolle prosequi* procedure is contained in N. C. Gen. Stat. 15-175 which is basically administrative[2] in nature and not related to the circumstances of the *Klopfer* case. The *nolle prosequi* or *nolle prosequi* with leave entry is most frequently used in criminal prosecutions where the State desires to defer trial because the evidence available to the State is insufficient to support a conviction. *State* v. *Furmage* 250 N. C. 616, 622, 109 S.E. 2d 563, 568 (1959).

Although entry of *nolle prosequi* or *nolle prosequi* with leave is ultimately within the control of the court, the decision to make such entry is customarily and properly left in the discretion of the Solicitor. *State* v. *Moody* 69 N. C. 529 (1873). The wide latitude allowed by the trial courts to the prosecuting officer in exercising the discretionary *nolle prosequi* power is plainly intimated in the early case of *State* v. *Thompson,* as follows:

> ". . . the Attorney General has a discretionary power to enter a *nolle prosequi,* for the proper exercise of which he is responsible. We know of no case where the court has interfered with the exercise of this power, though they certainly would do so if it were oppressively used." *State* v. *Thompson* 10 N. C. 613, 614 (1825).

Exhibiting an awareness evidently not applied in Klopfer's case, the North Carolina Supreme Court has repeated-

2. N. C. Gen. Stat. 15-175 provides that a *nolle prosequi* with leave shall be entered in all criminal actions as to which the indictment has been pending for two terms of court and the accused has not been apprehended. In such cases, the Clerk of Superior Court is empowered to issue a *capias* for the defendant without the necessity of a request from the Solicitor when the Clerk has reasonable grounds to believe the defendant may be arrested. This statute enables police officers to quickly obtain a capias for the arrest of a long sought defendant without first having to locate the Solicitor who may be in another county of the Solicitorial District.

ly recognized that the discretionary *nolle prosequi* power has the clear potentiality for abuse by the Solicitor resulting in oppression and harassment of the accused. *State* v. *Thornton*, 35 N. C. 256 (1852); *State* v. *Smith*, 129 N. C. 546, 40 S.E. 1 (1901); *Wilkinson* v. *Wilkinson*, 159 N. C. 265, 74 S.E. 740 (1912). However, in the case of an entry of *nolle prosequi* the North Carolina Supreme Court feels the possibility of abuse is restrained and minimized through the necessity of court approval before a *capias* may issue for the accused. *Wilkinson* v. *Wilkinson, supra.*

No opinion has yet been rendered by the Supreme Court of North Carolina imposing any specific standard by which one may determine what constitutes the proper exercise of the *nolle prosequi* power. The universal practice in North Carolina is for the Solicitor to make an entry of *"nol. pros."* or *"nol. pros.* with leave" without any statement as to the circumstances thereof or a justification for said entry. *State* v. *Smith*, 129 N. C. 546, 40 S.E. 1 (1901). This practice is confirmed by the record reported as before the State Supreme Court in the *nolle prosequi* cases cited herein such as *State* v. *Williams*, 151 N. C. 660, 65 S.E. 908 (1909); *State* v. *Smith*, 170 N. C. 742, 87 S.E. 98 (1915). Indeed, the North Carolina Supreme Court has never stated nor implied that an explanation of the circumstances or any justification need be given by the Solicitor in connection with an entry of *nolle prosequi* or *nolle prosequi* with leave. Referring to the entry of *nolle prosequi* with leave, the North Carolina Supreme Court has stated:

> "If the [trial] Court thinks proper to grant such leave at the time the *nol. pros.* is entered, we do not see why it may not do so; and we do not feel like reversing a practice so universally adopted in the State." *State* v. *Smith*, 129 N. C. 546, 548, 40 S.E. 1, 1-2 (1901).

North Carolina Gen. Stat. 15-1 provides for a two-year statute of limitations within which to institute criminal prosecutions for most misdemeanors[3]. The trespass offense

3. N. C. Gen. Stat. 15-1 applies to all misdemeanors except those as to which malice is an element of the offense. Malice is not an element of the misdemeanor offense of trespass as defined in N. C. Gen. Stat. 14-134. Therefore, the two-year statute of limitations under N. C. Gen. Stat. 15-1 applies to trespass charges under N. C. Gen. Stat. 14-134.

with which Klopfer is charged under N. C. Gen. Stat. 14-134[4] is a misdemeanor to which N. C. Gen. Stat. 15-1 applies. It is a basic rule that the return of a bill of indictment charging a misdemeanor arrests the running of the statute of limitations. Of particular relevance to the situation confronting Klopfer is the rule in North Carolina that the entry of *nolle prosequi* with leave in a misdemeanor case does not start the statute of limitations running again. *State* v. *Williams*, 151 N. C. 660, 65 S.E. 908 (1909). Therefore, under a *nolle prosequi* with leave entry, prosecution may be resumed on the pending bill of indictment after greatly prolonged delay and unaffected by any statute of limitations.

The foregoing discussion impels the conclusion that in North Carolina an entry of *nolle prosequi* with leave in a criminal prosecution secures to a Solicitor the virtually unbridled prerogative to postpone trial of a criminal charge indefinitely. In effect, the *Klopfer* case (R. 15-17.) now permits a Solicitor by entry of *nolle prosequi* with leave to permanently deny to a defendant the opportunity of exoneration by a public trial.

Klopfer's predicament results from the holding in his case that, irrespective of the past and prospective delay involved, the entry of *nolle prosequi* with leave deprives a defendant of the right to ever compel the State to give him a trial. (R. 15-17.) Under North Carolina law, Klopfer now has no other recourse by which to secure trial and obtain a determination of his guilt or innocence.

b. The Right to a Speedy Trial: Enacted in Magna Carta and Enshrined in the Bill of Rights.

Prompt administration of justice as an essential and preeminent right of the individual and obligation of government receives express endorsement in English law at least as early as Magna Carta. In the original issue of Magna Carta by King John in 1215, Chapter 40 in its entirety

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4. N. C. Gen. Stat. 14-134 makes it an offense of trespass to "go or enter upon the lands of another, without a license therefor" and "after being forbidden to do so." See: *Blow* v. *North Carolina*, 379 U. S. 684 (1965).

reads, "To no one will we sell, to no one will we deny, or delay right or justice." Chapter 39 is the most famous passage in Magna Carta with its provision that all criminal prosecutions instituted against a "freeman" shall adhere to the "law of the land". Modern scholars consider the "law of the land" provision in Magna Carta as the principal forerunner of the concept, "due process of law". It is significant that in the definitive reissue of Magna Carta by Henry III in 1225, Chapters 39 and 40 of the original Great Charter were combined and appear together as Chapter 29. SWINDLER, MAGNA CARTA: LEGEND AND LEGACY 241-243, 316-321 (1965). Ten of the thirty-seven chapters of the Great Charter of 1225, including the landmark Chapter 29, continue today as part of the modern British constitution. *Id.* at 242.

At the time of formulation of the Constitution of the United States, the heritage of common law safeguards of personal liberty was deeply engrained in American jurisprudence and emphatically proclaimed by the citizenry of this nation. Notwithstanding Hamilton's argument in THE FEDERALIST No. 84 that the addition of a bill of rights to the Constitution was unnecessary and possibly dangerous, the vocal sentiment of the public prevailed in favor of a specific enumeration of those rights deemed absolutely necessary to secure the blessings of liberty to each citizen. Among those basic procedural safeguards specifically guaranteed was the Sixth Amendment provision that an accused shall enjoy the right to a speedy and public trial in all criminal prosecutions.

The presentation in Congress of the proposed Bill of Rights resulted in a paucity of debate concerning the Amendments which detailed procedural safeguards such as the right to a speedy trial. This circumstance is sound evidence that a broad consensus existed within the nation as to what rights were supremely vital to assure liberty of the individual, and that among these rights was the right to a speedy trial. BRANT, THE BILL OF RIGHTS 223-225 (1965).

c. Due Process and the Sixth Amendment: Does the Constitutional Right to a Speedy Trial Apply to the States?

The decision of the North Carolina Supreme Court (R. 15-17), being here considered, permits the State, by utilization of the procedural device of a *nolle prosequi* with leave, to indefinitely suspend the prosecution of a trespass charge against Klopfer and, in effect, to permanently deprive Klopfer of having his day in court with the opportunity to exonerate himself. The *Klopfer* case poses to this Court for the first time the vital question: Does the Due Process Clause of the Fourteenth Amendment, with or without absorption of the Sixth Amendment guarantee of a speedy trial, secure to an accused the right to a speedy trial in all State criminal prosecutions? The answer is clearly in the affirmative by whatever line of reasoning employed.

As a general proposition, the Due Process Clause of the Fourteenth Amendment secures to each citizen in his relationship with the States those vital and fundamental safeguards "implicit in the concept of ordered liberty." *Palko* v. *Connecticut*, 302 U. S. 319, 325 (1937). Also see *Powell* v. *Alabama*, 287 U. S. 45 (1932).

In considering what procedural safeguards are implicit in the "concept of ordered liberty", this Court held in *In Re Oliver*, 333 U. S. 257 (1948) that due process under the Fourteenth Amendment requires that State prosecution of an accused be by public trial. Pointing to the vital protections afforded by the requirement of public trial in State criminal prosecutions, this Court observed:

> "Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power". *In Re Oliver* 333 U. S. 257, 270 (1948).

It is self-evident that the right to public trial, with its safeguard of the individual against judicial abuse, is seriously undercut in State prosecutions if there be no corollary constitutional right to a speedy trial. Indeed, the imperative of protecting an accused from judicial harassment, intimidation and persecution, which makes the right to a public trial an essential of due process of law, justifies with equal force and validity the conclusion that the right to a speedy trial is likewise an essential of due process of law. The fundamental nature of the right to a speedy trial is confirmed in the *Oliver* case, with this statement:

> "A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; . . . ".
>
> *In Re Oliver,* 333 U. S. 257, 273 (1948).

Regarding the character and function of juries in State criminal prosecutions, this Court held in *Turner* v. *Louisiana,* 379 U. S. 466 (1965), that due process of law under the Fourteenth Amendment requires that jury trials in State criminal prosecutions must be by impartial juries.

In the Sixth Amendment, the first three rights secured to an accused are those of speedy trial, public trial and impartiality of the jury.

However, in neither *Oliver* (public trial) nor *Turner* (impartial jury), *supra,* did this Court base its holding on the rationale of incorporation of these specific Sixth Amendment guarantees into the Due Process Clause of the Fourteenth Amendment. Instead, this Court found the right to a public trial in *Oliver, supra,* and the right to an impartial jury in *Turner, supra,* to be so basic and essential as to be implicit in the concept of due process without reference to the Sixth Amendment.

The broadening of the Due Process Clause of the Fourteenth Amendment to encompass all the procedural safeguards of the Sixth Amendment was accelerated by the decision of *Gideon* v. *Wainwright,* 372 U. S. 335 in 1963. *Gideon* held that the Sixth Amendment's guarantee

of assistance of counsel is obligatory upon the States for the reason that "a provision of the Bill of Rights which is 'fundamental and essential to a fair trial' is made obligatory upon the States by the Fourteenth Amendment." *Gideon* v. *Wainwright*, 372 U. S. 335, 342 (1963). With *Pointer* v. *Texas*, 380 U. S. 400 (1965), this Court reaffirmed the *Gideon* approach by holding that the Due Process Clause of the Fourteenth Amendment also incorporates the Sixth Amendment right of confrontation. The inclusion of the Sixth Amendment guarantees in the Due Process Clause of the Fourteenth Amendment was confirmed by this Court in its declaring that:

> "In the light of *Gideon*, *Malloy*, and other cases cited in those opinions holding various provisions of the Bill of Rights applicable to the States by virtue of the Fourteenth Amendment, the statements made in *West* and similar cases generally declaring that the Sixth Amendment does not apply to the States can no longer be regarded as the law."
>
> *Pointer* v. *Texas*, 380 U. S. 400, 406 (1965).

The right to a speedy trial has been characterized by this Court as "an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself". *United States* v. *Ewell*, 383 U. S. 116, 120 (1966). The right to a speedy trial also protects an accused from the State's using the threat of ill-founded, stale, or currently suspended prosecutions to intimidate him into foregoing the free exercise of First Amendment rights and other valued privileges of citizenship.

The vital interests of the individual safeguarded by the right to a speedy trial are clearly as essential to the "concept of ordered liberty" as are the Sixth Amendment rights to a public trial, to an impartial jury, to confrontation of witnesses and to assistance of counsel, which rights are within the scope of Fourteenth Amendment due process. In truth, virtually all the procedural rights encom-

passed in the Due Process Clause of the Fourteenth Amendment proceed from the assumption that an accused shall have his day in court with reasonable dispatch.

And by what conceivable manner of reasoning may the right to a speedy trial justifiably be disengaged from its eminent role in the Bill of Rights and logically repudiated as an essential of due process?

d. Indefinite Suspension of Prosecution over the Defendant's Objection: A Clear Denial of the Right to a Speedy Trial.

In blatant disregard of Klopfer's constitutional right to a speedy trial, the North Carolina Supreme Court in the *Klopfer* case (R. 15-17) took the unprecedented and incongruous position that criminal prosecution having been instituted against Klopfer, yet Klopfer may be denied forever his day in court by the arbitrary action of the Solicitor in entering a *nolle prosequi* with leave in Klopfer's case over Klopfer's objection.

The North Carolina Supreme Court stated its holding in the *Klopfer* case in the following terms and without any effort to analyze the relationship between North Carolina's *nolle prosequi* with leave practice and an accused's right to a speedy trial:

> "Without question a defendant has the right to a speedy trial, if there is to be a trial. However, we do not understand the defendant has the right to compel the State to prosecute him if the State's prosecutor, in his discretion and with the court's approval, elects to take a *nolle prosequi*. . . . In this case the solicitor and the court, in entering the *nolle prosequi* with leave followed the customary procedure in such cases. Their discretion is not reviewable under the facts disclosed by this record." *State* v. *Klopfer,* (R. 15-17.)

As discussed previously, under North Carolina practice the entry of *nolle prosequi* with leave in a criminal prosecution leaves the time of future trial, if indeed there is to be a trial, entirely within the unrestricted discretion of the Solicitor. *Wilkinson* v. *Wilkinson,* 159 N. C. 265, 74

S.E. 740 (1912); *State* v. *Klopfer,* (R. 15-17.) It is evident from the *Klopfer* decision (R. 15-17) that there is no statutory or constitutional provision in North Carolina which requires the Solicitor to ever bring Klopfer's case to trial. Equally apparent in the *Klopfer* decision (R. 15-17) is the fact that Klopfer now has no means under North Carolina law to compel the State to give him his day in court.

The question of whether delay in completing a particular criminal prosecution amounts to a denial of the right to a speedy trial depends upon all the circumstances and their relation to orderly expedition of criminal trials. *United States* v. *Ewell,* 383 U. S. 116 (1966). In determining whether delay in completing a criminal prosecution violates the accused's right to a speedy trial by extending beyond the period of time reasonably required by the State for the orderly administration of justice, the following four factors are especially relevant: the length of delay, the reason for the delay, the prejudice to the defendant and waiver by the defendant. *United States* v. *Simmons,* 338 F. 2d 804 (2nd Cir. 1964).

When these four factors are applied to the facts in the *Klopfer* case, it becomes immediately clear that none of them sustain to any extent the Solicitor's refusal to give Klopfer his day in court. As of August, 1965, when Klopfer's motion requesting trial or dismissal of his case was denied and the *nolle prosequi* with leave entered, almost eighteen months had elapsed since his indictment. (R. 7-9.) Likewise, over six months had passed since this Court's decision in *Hamm* v. *City of Rock Hill,* 379 U. S. 306 (1964)—a factor made relevant by Klopfer's contention in his motion for speedy trial (R. 9-12), that the holding in *Hamm* barred any prosecution of Klopfer on the trespass charge. In this context, the suspension of Klopfer's case by the *nolle prosequi* with leave pointed forcefully to the conclusion that, although technically suspended, the delay of Klopfer's trial would, in fact, be permanent.

As to a reason for the indefinite suspension of Klopfer's trial, the Solicitor representing the State did not state at

any point in the proceedings any reason or justification whatsoever for entry of the *nolle prosequi* with leave. (R. 1-14.) At no point in the record of the proceedings (R. 1-14) or in the *Klopfer* opinion (R. 15-17) is there the slightest suggestion that the defendant has waived in any manner his right to a speedy trial. On the contrary, the record discloses clearly that Klopfer affirmatively sought the benefit of his right to a speedy trial in the trial court. (R. 9-12.)

In the *Klopfer* case, it is the factor of prejudice to the accused which is most glaringly transgressed by North Carolina's *nolle prosequi* with leave procedure. Along with preventing "undue and oppressive incarceration prior to trial"—a circumstance not in the *Klopfer* case, this Court in the case of *United States* v. *Ewell*, decided at the last Term, pointed out that the right to speedy trial protects an accused in the basic and vital interests of minimizing "anxiety and concern accompanying public accusation" and limiting "the possibilities that long delay will impair the ability of an accused to defend himself". *United States* v. *Ewell*, 383 U. S. 116, 120 (1966). It is apparent that the right to a speedy trial also safeguards other cherished interests of the individual such as protecting against the possibility of oppression by intimidation and harassment and minimizing the expense and inconvenience involved in defending a criminal prosecution.

The State's denial of a speedy trial to Klopfer has burdened Klopfer with the very evils against which the right to a speedy trial is a shield. The offense of trespass with which Klopfer was charged exposed him to considerable contact with North Carolina criminal procedure consisting of arrest, posting of two different bonds, required attendance at a number of court sessions, a complete trial which ended in a mistrial, and a court-ordered appearance in court the week after the mistrial. (R. 1-9.) As is true in many ordinary misdemeanor charges, this substantial and unexpected involvement with the law obviously exposed the accused to considerable investment of his time and funds in defending against the prosecution. To this economic burden is added the often considerable inconvenience of repeated appearances in court.

Considering the factor of our increasingly transient population and the inevitable corrosive effect which time has upon memory, the denial of a speedy trial to Klopfer exposes him to the real possibility of substantial erosion of the evidence by which to defend himself. True, the State bears the same risk. But the adverse effect of delay on the availability and reliability of evidence is seldom, if ever, weighed out in precisely even portions. Therefore, in every criminal prosecution delay may prejudice the outcome in favor of the State.

The denial of a speedy trial to Klopfer, a professor of zoology at Duke University, is a gross invasion of his fundamental right to be secure in his reputation, standing and participation in the community. This unresolved prosecution exposes Klopfer, without recourse on his part, to the suspicions and adverse repercussions naturally attendant in any community toward anyone charged with a criminal offense. Likewise, Klopfer has been and is exposed now to the personal anxiety and apprehension which naturally arises in anyone confronted with a criminal prosecution, irrespective of the prospects for vindication.

With regard to the evil of oppression by intimidation and harassment, the denial of a speedy trial to Klopfer creates leverage by which the State may attempt to stifle, penalize and discourage the exercise of First Amendment rights such as free speech and free assembly where the accused has challenged the prevailing opinion of the community, as did Klopfer. (R. 10-11.) Since it is highly probable that the principle in *Hamm* v. *City of Rock Hill,* 379 U. S. 306 (1964) operates to bar prosecution of Klopfer on the trespass charge (R. 10-11), denial of a trial to Klopfer levies its most serious penalty in depriving Klopfer of the opportunity to obtain almost certain exoneration in public trial proceedings. The studied indifference shown by the North Carolina courts toward Klopfer's claim of the constitutional right to a speedy trial is evidence of the persistent and prejudicial indulgences in favor of the State and at the expense of the accused which pervade the administration of criminal justice in state courts, particularly in the South. In the *Klopfer*

case, the Solicitor's supposed pragmatic concern with the economics and possible outcome of a retrial for Klopfer was readily given priority over Klopfer's right to have the opportunity of exoneration. (R. 16-17.)

By trespassing upon these vital interests of the petitioner, Klopfer, the State of North Carolina has subjected Klopfer to a subtle and indirect, but nevertheless burdensome, form of punishment for an offense as to which the State is barred in all probability from obtaining a conviction. It would seem to admit of little argument that if the right to a speedy trial protects an accused from unreasonable delay, it necessarily protects an accused from total denial of the opportunity to have his day in court. Clearly those vital interests of the accused safeguarded by the right to a speedy trial are threatened and trampled proportionately more by absolute denial of trial than they are by unreasonable delay of a trial eventually held.

Although North Carolina's *nolle prosequi* with leave procedure may be of value in expediting criminal prosecutions, the objection by a defendent to its entry in his case obviously invokes the protection of the constitutional right to a speedy trial. It is contended here that the intentional act of the Solicitor in entering a *nolle prosequi* with leave over Klopfer's objection, taken in conjunction with the previous lapse at that time of eighteen months since indictment, constitutes unreasonable delay violative of Klopfer's right to a speedy trial and justifying this Court in holding further prosecution to be barred and that the indictment be dismissed. At the very least, the State's blatant disregard of Klopfer's right to a speedy trial entitles Klopfer to the relief of requiring the State of North Carolina to either give him a prompt trial or dismiss the indictment.

CONCLUSION

To make effective the guarantee of an accused's right to a speedy trial under the Sixth and Fourteenth Amendments in state criminal prosecutions, it is submitted the judgment below of the North Carolina Supreme Court should be reversed.

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